SOME VEXATIOUS QUESTIONS RELATING TO NATIONALITY

The war has occasioned much discussion of questions growing out of the conflict of municipal laws with regard to nationality, a subject which has often been the cause of international complications. Great annoyance has been experienced by the belligerent governments generally in dealing with persons possessing a "dual nationality". Conflicting claims to the allegiance of such persons have frequently arisen in connection with steps taken by these governments to recruit their man-power at home and abroad; and neutral governments have been concerned over requirements of military service made on such persons whose allegiance they claimed. The war has also served to emphasize certain serious questions as to the construction of the Act of Congress of March 2, 1907,[1] which was enacted with a view to clarifying the law of the United States with regard to citizenship.

It is the purpose of this article briefly to discuss (1) the reasons underlying the annoying difficulties that grow out of conflicting municipal laws respecting nationality, wih particular reference to certain features of the laws of the United States bearing on such difficulties; and (2) some unfortunate obscurities in the existing law of this country.

I

According to the common law, place of birth determines nationality.[2] Lord Chief Justice Cockburn, in his "Treatise on Nationality", states the rule as follows;[3]

"By the Common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled or merely temporarily sojourning, in the country, was an English subject; save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England. No effect appears to have been given to descent as a source of nationality."

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[1](1907) 34 Stat. 1228, 4 U. S. Comp. Stat. (1916) §§ 3958-64.

[2]Calvin's Case (1608) 7 Coke la., 18.

[3](1869) p. 7.

By statute, foreign-born children of British subjects were declared to be natural-born subjects of the Crown:[4]

"All children born out of the ligeance of the Crown of England or of Great Britain, or which shall hereafter be born out of such ligeance, whose fathers were or shall be natural-born subjects of the Crown of England or of Great Britain, at the time of the birth of such children respectively, . . . are hereby declared to be natural-born subjects of the Crown of Great Britain to all intents, constructions, and purposes whatsoever."

The above stated common law and statutory principles also underlie the British law of nationality which went into effect in 1915.

It is now settled that the law of the United States relating to nationality is substantially the same as that of Great Britain. The Fourteenth Amendment to the Constitution is declaratory of the common law doctrine, as stated by Mr. Justice Gray in *United States* v. *Wong Kim Ark*,[5] "of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born or resident aliens, with the exception of qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within, or during the hostile occupation of a part of our territory, and with the single additional exception of children of the Indian tribes owing allegiance to their several tribes."

The Act of April 14, 1802,[6] extended citizenship to foreign-born children of American citizens. This law conferred citizenship on foreign-born children of parents, who at the date of its enactment were or had been citizens of the United States, and did not include foreign-born children of persons becoming citizens since that date.[7]

The Act of February 10, 1855,[8] amplified this statute so as to extend citizenship to "persons heretofore born, or hereafter to

[4] St. 4 Geo. 2 (1730-1) c. 21, § 1.

[5] (1898) 169 U. S. 649, 18 Sup. Ct. 456.

[6] 2 Stat. 155, 5 U. S. Comp. Stat. (1916) § 4367.

[7] 2 Kent. Comm. (14th ed. 1896) *52-53; State *ex rel.* Phelps *v.* Jackson (1907) 79 Vt. 504, 65 Atl. 657; United States *v.* Wong Kim Ark (1898) 169 U. S. 469, 18 Sup. Ct. 456. But see Boyd *v.* State *ex rel.* Thayer (1892) 143 U. S. 135, 12 Sup. Ct. 375, in which Chief Justice Fuller expressed the view that "the intention was that the Act of 1802 should have a prospective operation".

[8] (1855) 10 Stat. 604, 4 U. S. Comp. Stat. (1916) § 3948.

be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States."

It is therefore clearly established now that citizenship in the United States is, fundamentally, determined by place of birth (*jus soli*) as distinguished from citizenship through descent (*jus sanguinis*), except in the case of foreign-born children of American citizens.

In a communication under date of June 9, 1915,[9] addressed by Secretary of State Lansing to Senator Lodge in which the question of dual nationality was discussed, Mr. Lansing said:

"The cases of persons born in the United States of alien parents should not be confused with the cases of persons born abroad who have obtained naturalization as citizens of this country. In the former cases the Department recognizes now, as it always has heretofore, that the persons concerned are born with a dual nationality. In the latter cases the Department does not recognize the existence of dual nationality in view of the fact that persons who obtain naturalization as citizens of this country are required to renounce their original allegiance."

As pointed out by Mr. Lansing, the Department of State has consistently recognized the existence of dual nationality resulting from a conflict between the *jus soli* and *jus sanguinis*. Any suggestion such as has sometimes been made[10] that no dual nationality should be recognized in cases of this character is obviously without any foundation. The United States in its practice in relation to this question clearly cannot dsregard the general doctrine of nationality underlying the law of continental Europe, particularly since the principle of the *jus sanguinis* is apparently in a measure incorporated in our own law.[11] Serious international difficulties infrequently result from such a conflict of laws. The principles underlying it are well recognized among nations, and it is seldom that there is any fundamental difference of opinion in respect of their application.

The fact that the Government of the United States has in the past been unable to obtain, as it has at times attempted to do, the concurrence of other nations in the view that no dual status can exist in the case of a person who becomes naturalized in this

[9](Special Supp. 1915) 9 American Journal of International Law 369, 373.

[10]See, for example, the extract from Senator Lodge's letter to Secretary Lansing, quoted in the letter of Secretary Lansing above referred to.

[11]See (1802) 2 Stat. 155, 4 U. S. Comp. Stat. (1916) § 3947.

country is evidently the cause of the difficulties that have not infrequently arisen between our Government and other governments with regard to questions of nationality.

Judicial and administrative authorities of the United States have not infrequently overlooked the fundamental principle that expatriation from the legal standpoint is a domestic affair, governed by municipal law and in no way controlled by international law, although questions in connection with the change and multiplication of nationality are often the cause of international complications. It seems clear that at the present time nations generally, including the United States, do not in their practice recognize the doctrine that has sometimes been advanced that a person may as a matter of natural and inherent right throw off his allegiance without the consent of his government. It can probably be correctly said that there are few subjects respecting which authorities of our Government have uttered such varying and inconsistent statements. A few illustrations will suffice to make this clear.

Prior to any legislative declaration on the subject of expatriation, American courts appear to have expressed, generally, though not uniformly, the view that the United States inherited the English common law doctrine that a person cannot by his own act, without the consent of his government, throw off his allegiance. In *Shanks* v. *Dupont*,[12] Justice Story declared the general doctrine to be "that no persons can by any act of their own, without the consent of the government, cast off their allegiance and become aliens." Following a résumé of decisions, Chancellor Kent, in his Commentaries, says:[13]

"From this historical review of the principal discussions in the Federal courts on this interesting subject in American jurisprudence, the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States without the permission of the Government, to be declared by law; and that, as there is no existing legislative regulation on the case, the rule of the English Common Law remains unaltered."

The first Secretary of State to announce the doctrine that naturalization in the United States not only imposes on a person a new allegiance but also absolves him from all the obligations of his former allegiance appears to have been James Buchanan.

[12](28 U. S. 1830) 3 Pet. 241.

[13](13th ed. 1884) Vol. II, p. *49.

In an instruction of December 18, 1848, to George Bancroft,[14] American Minister at London, regarding the duty of the United States in protecting American citizens naturalized or native, Mr. Buchanan said:[15]

"Our obligation to protect these classes (naturalized and native American citizens) is in all respects equal. We can recognize no difference between the one and the other, nor can we permit this to be done by any foreign government, without protesting and remonstrating against it in the strongest terms. The subjects of other countries who, from choice, have abandoned their native land, and, accepting the invitation which our laws present, have emigrated to the United States and become American citizens, are entitled to the very same rights and privileges, as if they had been born in the country. To treat them in a different manner would be a violation of our plighted faith as well as of our solemn duty."

On the other hand, the earlier doctrine was later reasserted by Secretary Webster in a letter under date of June 15, 1852, in reply to an inquiry as to whether a native of France who had been naturalized in the United States could expect protection from this Government in France, when proceeding thither with an American passport. In this communication, Mr. Webster said:[16]

"If, as is understood to be the fact, the Government of France does not acknowledge the right of natives of that country to renounce their allegiance, it may lawfully claim their services when found within French jurisdiction."

As further instances of the varying views of the executive officers of this Government, attention may be called to opinions rendered by Attorneys General Caleb Cushing and Jeremiah S. Black.

Mr. Cushing, in an opinion given by him in 1856 with reference to a question propounded by the Bavarian Minister at Berlin regarding the law of the United States, defined expatriation as "a general right, subject to regulation of time and circumstances according to public interests; and the requisite consent of the state presumed where not negatived by standing prohibitions." Subject to "the conditions thus indicated", and to "such others as the public interest might seem to Congress to require to be imposed", it seemed to him, he stated, that the right of expatriation

[14]An interesting article by Dr. J. B. Moore in Harper's Magazine, January 1905, gives a historical sketch of the attitude of American officials.

[15]3 Moore, Digest of International Law (1906) 566-567.

[16]Moore, *op. cit.* 567.

existed and might be freely exercised by citizens of the United States.[17]

On the other hand, Judge Black, as Attorney General, in 1859, in an opinion given to President Buchanan regarding the arrest and impressment into military service at Hanover of Christian Ernst, a naturalized American citizen of German origin who had returned to that city, advised that it was the "natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose", and to throw off his natural allegiance and substitute another for it, that "natural reason and justice, writers of known wisdom", and "the practice of civilized nations" were all opposed to the doctrine of perpetual allegiance"; that "expatriation included not only *emigration* out of one's country, but *naturalization* in the country adopted as a future residence"; that if Mr. Ernst, a citizen of the United States, violated the law of Hanover which forbade him to transfer his allegiance to the United States, the laws of the two countries were in conflict, and "then the law of nations steps in to decide the question upon principles and rules of its own."[18]

By the Act of July 27, 1868,[19] Congress declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness". The act further contains provisions requiring the President to take certain steps looking to the release of any American citizen who "has been unjustly deprived of his liberty by or under the authority of any foregn government".

Irrespective of what may be considered to be the intendment of this Act, it seems clear that since the date of its enactment the legislative department of the Government has passed legislation which negatives the idea of any inalienable right of expatriation on the part of a citizen without the consent of his government.

In connection with the subject of such legislation, it is interesting and pertinent to bear in mind Attorney General Black's definition of the right of expatriation. His statement that the law of nations determines by rules of its own the conflict between national laws respecting nationality may be ascribed to a failure to distinguish between international law and municipal law. How-

[17] 8 Op. Atty. Gen. 139, 162, 168.

[18] 9 Op. Atty. Gen. 356.

[19] 15 Stat. 223, 4 U. S. Comp. Stat. (1916) §§ 3955, 3957.

ever, his view that expatriation includes both immigration and naturalization is evidently in harmony with his broad definition and appears logical and correct.

The Act of March 2, 1907, provides that "no American citizen shall be allowed to expatriate himself when this country is at war". This law further provides that, "when any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years". And unless such person can rebut this presumption under rules prescribed by the Department of State, this Government ceases to extend him its protection abroad. Immigration and naturalization, which Attorney General Black said are included in expatriation are both, as domestic questions, regulated by comprehensive congressional enactments.

It would accordingly seem clear that an unrestricted right of expatriation is not recognized under the laws of a country like the United States which deny the right of expatriation during times of war; which do not confer (as it has sometimes erroneously been stated they do) on naturalized citizens all the rights and privileges enjoyed by natives, eligibility to the Presidency for instance being limited to native citizens, and the right to protection being withdrawn from naturalized citizens because of residence in a foreign country for specified periods; and which extensively restrict alien immigration and naturalization.

It seems pertinent to observe with reference to laws of this general character, and with particular reference to those relating to the loss of protection of the United States resulting from residence abroad, that it may be well for this Government carefully to consider whether such legislation should not be regarded as having the effect of imposing substantial limitations on it with respect to representations to a foreign country relative to the treatment by such foreign country of natives thereof who may return thereto after having been naturalized in the United States.

Furthermore, it seems pertinent to bear in mind that our law is probably more conducive to conflicts of nationality than are the laws of other countries. This observation could perhaps be made with regard to the law of this country solely for the reason that it is grounded on the *jus soli*. The fact that nationality may also be acquired by the combined effect, so to speak, of descent and residence appears to have been responsible in a measure for

some international difficulties. If an American citizen obtains naturalization under the laws of a foreign country during times of war, he evidently had a dual nationality, since this Government cannot interfere with the operation of the laws of such foreign country. The inconsistency of the Government of the United States in occasionally insisting that persons coming to our country from countries which place restrictions on expatriation have not a dual nationality when they obtain citizenship under the laws of the United States without being first released from their original allegiance becomes clear in the light of our own restriction on expatriation, which would be meaningless unless it is construed as holding a person to his allegiance to the United States irrespective of any action he may take to acquire citizenship under the laws of another country. And yet the United States in admitting foreigners to citizenship is indifferent to the status of such persons under the laws of their country of origin. Some nations do not admit persons to naturalization except on proof that their change of allegiance is permitted by the governments to which they owe allegiance.[20] Hall suggests that easy requirements for naturalization may be inconsistent with comity between nations. He says:[21]

"In the meantime, and until an agreement is come to upon the question of principle, it may be said that though a state has in strictness full right to admit foreigners to membership, and to protect them as members, it is scarcely consistent with the comity which ought to exist between nations to render so easy the acquisition of a national character, which may be used against the mother state, as to make the state admitting the foreigner a sort of accomplice in an avoidance by him of obligations due to his original country."

As observed by Cogordan,[22] the idea of a native land, which presupposes fidelity and attachment, is incompatible with the idea of the coexistence of several nationalities in the same individual, but in practice conflicts of nationality are often inevitable because of the peculiar legal situation of an individual claimed as a national by two countries. Irrespective of what might be termed the

[20]See 3 Moore, *op. cit.* 588.

[21]International Law (5th ed. 1904) 241.

[22]L'idée même de patrie, qui suppose la fidélité et l'attachment, est incompatible avec la coexistence de plusieres nationalités chez le même individu. Mais, en pratique, les conflicts positifs de nationalité, où deux pays réclament le même individu comme national, sont une cause fréquente de difficultés entre les États. La nationalité au point de vue des rapports internationaux (2nd ed. 1890) 15.

ethical aspects of the views at times asserted by the Government of the United States as to the extent to which recognition should be given by one government of the status conferred by another through naturalization of foreigners, the difficulty attending any effort on the part of this Government to bring about the acceptance by other governments of views at times asserted in the past evidently is, that, as has been pointed out, there is no generally accepted principle of the law of nations to which, in international relations, municipal laws with respect to expatriation must yield. It is clear, therefore, that a situation exists in which there is an irreconcilable conflict between the laws of two governments, each of which laws have full force and effect in the respective countries.

Authorities on international law generally have in an explicit manner recognized this situation. Touching this point, Mr. Hannis Taylor says:[23]

"As every state is equally entitled to its own views as to the nature and extent of the right of expatriation, and as no general understanding has been reached on the subject, no one state can do more than settle the question for itself by its own action, and as to others by express treaty stipulations."

Halleck says:[24]

"Admitting, then, that the right of expatriation, in its broadest and most comprehensive sense, is recognised as a maxim of international law, this principle must be subordinate to the universally conceded doctrine of the same law, that every independent State possesses exclusive sovereignty within its own territory, that its law binds all persons within its own jurisdiction, but cannot operate within the territory of another power."

Apart from the reference to a "maxim of international law", this assertion could seemingly be properly interpreted to mean that the question of expatriation through naturalization is like other questions with respect to nationality governed by municipal law.

Oppenheim says:[25]

"Since the law of nations does not comprise any rules concerning naturalisation, the effect of naturalisation upon previous citizenship is exclusively a matter of Municipal Law of the States concerned. Some states, as Great Britain, have legislated that one of their subjects becoming naturalised abroad loses thereby his previous nationality; but other States, as Germany, have not done

[23]International Public Law (1901) 227.

[24]1 International Law (3rd ed. 1893) 411.

[25]1 International Law (2nd ed. 1905) §§ 359-360.

this. Furthermore, some states, as Great Britain again, deny every effect to the naturalisation granted by them to a foreigner whilst he is staying on the territory of the State whose subject he was previous to his naturalisation, unless at the time of such naturalisation he was no longer a subject of such State."

Hall says:[26]

"A state has necessarily the right in virtue of its territorial jurisdiction of conferring such privileges as it may choose to grant upon foreigners residing within it. It may therefore admit them to the status of subjects or citizens. But it is evident that the effects of such admission, in so far as they flow from territorial rights of a state, make themselves felt only within the state territory. Outside places under the territorial jurisdiction of the state, they can only hold as long as they do not conflict with prior rights on the part of another state to the allegiance of the adopted subject or citizen. A state which has granted privileges to a stranger cannot insist upon his enjoyment of them, and cannot claim the obedience which is correlative to that enjoyment, outside its own jurisdiction as against another state, after the latter has shown that it had exclusive rights to the obedience of the person in question at the moment when he professed to contract to yield obedience to another government."

Hall points out that international law by its very nature is not competent to prescribe a rule regarding the rights of an individual against his state. As "individuals have no place in international law", he says, rights of individuals to change their nationality, if binding on states, "must be so through the possession of a right by the individual as against his state which is prior to and above those possessed by the state as against its members", and whether or not such a right exists, "international law is obviously not competent to decide".[27] But it is evidently not Hall's view that international law by its nature is such that it could not prescribe a generally accepted rule with regard to the character and extent of recognition that one nation should give to the status conferred on its nationals by another nation. With regard to the application of international law to such a question he says:[28]

"International law must either maintain the principle of the permanence of original ties until they are broken with the consent of the state to which a person belongs who desires to be naturalized elsewhere, or must recognize that the force of this principle has been destroyed by diversity of opinions and practice, and that

[26] International Law (5th ed. 1904) 215.

[27] *Ibid.*, 230.

[28] *Ibid.*, 231.

each state is free to act as may seem best to it. There can be no doubt that the latter view is more in harmony with the facts of practice than the former."

An interesting question arises as to the status in a third country of a person having a dual nationality as a result of a conflict between national laws. While neither of the two countries whose laws conflict can claim the allegiance of such a person as against the other, both may presumably be entitled to extend their protection to him in a third country. With regard to the rights of two such governments against third states, Oppenheim observes that each of them "appear as his Sovereign", and that "it is therefore possible that each of them can exercise its right of protection over him within third States".[29]

A more difficult phase of this question, one of a practical nature, concerns the attitude of a third country towards the claims of the country of nativity and the country of adoption. The third country, in the absence of any applicable principles of law, will doubtless suit its convenience as to its dealings with such persons.[30] This question, which perhaps infrequently arises in times of peace, has been one of considerable interest during the war. The United States and other belligerent nations have taken such action with regard to the status of these persons as the national safety has appeared to require, and restrictions on the activities and places of residence of these persons have been governed by that rule. So far as the United States is concerned, it evidently could not logically insist, in spite of any importance it may attach to nationality conferred by naturalization, that citizenship conferred by it must be regarded as exclusively determining such a person's status in a third country. It has really shown, by legislation denying certain privileges to naturalized persons and by legislation revoking under certain circumstances all privileges granted to them, that it attaches much more importance to nationality acquired by birth than to nationality acquired through naturalization.

The Government of the United States can, without illogically asserting an unqualified right of expatriation based on the existence of some supposed principle of international law relating to change of nationality, continue as it has done in the past, through treaty negotiations and otherwise, to bring about as far as possible,

[29] 1 International Law (2nd ed. 1905) § 310.

[30] See *Ibid.* § 310.

a reciprocal and uniform practice in respect of the status of immigrants who acquire a new nationality. By adopting this consistent and logical course, it will doubtless accomplish more than it has in the past looking to the freedom on the part of the individual to choose a new nationality and to be released from his old allegiance. At times the Department of State has evidently acted in harmony with such a policy, as shown for example in its attitude in discussing some years ago with the Government of Guatemala the case of J. Zenon Posadas,[31] in whose behalf the Guatemalan Government had refused to receive any representatives from the Government of the United States, although he had resided in this country for over twenty years during approximately half of which period he had been a naturalized American citizen. In an instruction of September 20, 1912, to the American Legation at Guatemala City, the Department, after pointing out that the Guatemalan Government's position seemed inconsistent with certain provisions of its Law of Foreigners of 1904, which appeared to recognize the right of expatriation through naturalization in another country, said:

"As the Department understands it from the note of the Minister for Foreign Affairs, the position of the Guatemalan Government would apparently, for all practical purposes, deny the right of expatriation on the part of Guatemalan citizens—a position which is even more extreme than that taken by these governments (in some of which the Powers have found it necessary to exercise extraterritorial rights) which deny to their nationals the right to throw off their allegiance without the consent of the government and accordingly refuse to recognize naturalization obtained in another country unless such consent has first been obtained. . . .

"The Department feels that Mr. J. Zenon Posadas, who eight years ago renounced his Guatemalan allegiance and became a citizen of this country—an act apparently not only not in violation of the law of Guatemala but recognized by such law—has grounds for complaint against the position taken by the Guatemalan Government to the effect that in relation to his business affairs in that country he must be regarded as a citizen of Guatemala not entitled to the assistance of this Government in connection with any difficulties he may have with the Guatemalan Government. The Department considers that this position of the Guatemalan Government, if insisted on, must render impracticable the solution of important questions which are likely continually to arise from time to time between the two Governments."

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[31] See For. Rel. 1903, p. 581, *et. seq.*

It seems possible that in the recently concluded Treaties of Peace a precedent may be found that may be of some value in furtherance of a uniform policy of liberality in dealing with questions relating to the loss and acquisition of nationality. Article 278 of the Treaty with Germany, which, with the sole alteration of the name of another country substituted for Germany, appears in other treaties, reads as follows:

"Germany undertakes to recognize any new nationality which has been or may be acquired by her nationals under the laws of the Allied and Associated Powers and in accordance with the decisions of the competent authorities of these powers pursuant to naturalization laws or under treaty stipulations, and to regard such persons as having, in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin."

The obscurities so often consequent upon the difficulty of framing stipulations in international agreements in which a considerable number of nations participate are evident to a slight degree in the language of the above quoted article. However, there is no doubt as to its meaning. It stipulates a unilateral obligation to recognize new nationality acquired under naturalization laws or under treaty stipulations; and the obligation in explicit terms eliminates all questions of dual nationality on the part of a person who acquires a new nationality. The country of origin of such a person relinquishes all claim to his allegiance.

The obligations of this article are unilateral, and among the numerous nations which joined in imposing the article on enemy countries are several whose practice does not conform to the principles underlying it. However, as suggested above, it seems possible that it may serve as a precedent for some action in the near future looking to the establishment through international agreement of a uniform, liberal practice among the majority of the nations of the world. For this purpose international conventional stipulations would seem desirable, but substantial progress might be made through a less formal procedure in the nature of international agreement with regard to the recommendation of principles for incorporation into municipal enactments.[32] Even though a general adoption of such sweeping provisions as those found in the Treaties of Peace with reference to the status of

[32]See Résolutions adoptées par l'Institut de droit international en séance du Septembre 1896, rélativement aux conflicts de lois en matière de nationalité (naturalization et expatriation) (1896) 15 Annuaire de l'Institut de Droit International 270.

persons who acquire a new nationality might not be practicable or even desirable, there would appear to be no considerable obstacle to the formulation of principles of a reasonably satisfactory policy. Furthermore, it would seem not improbable that a desirable adjustment of the less serious difficulties resulting from conflict between the *jus soli* and the *jus sanguinis* might be found in an international understanding based on a well-defined recognition of the so-called doctrine of election of nationality or on a rule with respect to domicile.

At the present time, practically all nations, by placing restrictions on the right of persons to expatriate themselves, deny an unqualified right to throw off allegiance without consent of their governments. However, through modifications of their laws and through treaties, they have generally tempered the doctrine of perpetual allegiance. For example, England in 1870 passed an act[33] abandoning the common law doctrine of perpetual allegiance and providing that a British subject, on becoming naturalized in a foreign state, shall lose his original national character. And the United States by the Act of March 2, 1907, permitted expatriation, although it restricted it to times of peace. It would seem important that the Government of the United States, with a view to furthering the principles so frequently professed by it, should in the first instance carefully consider whether modifications of its own municipal laws and practice might not materially contribute to the desired end.

II

Statutory and constitutional provisions embodying the law of citizenship in the United States are and doubtless must be of such a general character that their practical application not infrequently involves somewhat troublesome questions of interpretation. However, existing statutes are such that it would evidently be possible as it would be highly desirable that they should be amplified and rendered more certain.

In accordance with the principle of election of nationality which has some recognition in international practice, a person possessing a dual status resulting from conflict between the *jus soli* and the *jus sanguinis* may on reaching his majority or within a reasonable time thereafter make an election of nationality.[34]

[33] St. 33 & 34 Vict. (1870) c. 14.

[34] See Van Dyne, Citizenship (1904) 25.

The legislation of the United States seems incomplete, or probably it may be said inconsistent, in dealing with this subject of election, in that it contains only provisions in respect of the choice of American nationality on the part of a person born of American parents abroad. The principle of election appears to be recognized in a measure in Section 6 of the Act of March 2, 1907, which reads as follows:

"That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

On the other hand our law apparently contains no recognition of an election of the nationality of another country acquired by descent which a person such as is referred to in the above quoted provision might make. During the war, American military authorities held for military service as American citizens persons born in the United States regardless of the fact that it might be clear that such persons possessed nationality of another country and regardless of strong evidence indicating that an election had been made of the nationality of such country.

A precise definition of the scope of the provision of the Act of March 2, 1907, with regard to the restriction on expatriation during times of war would have been desirable. Evidently there can be no doubt that this provision should be construed to apply to persons who obtain naturalization under the naturalization laws of another country. There seems somewhat less certainty as to its application to a person who takes an oath of allegiance to a foreign country, or to a woman who marries a foreigner, or to a naturalized citizen residing abroad for a protracted period.

In the so-called "Citizenship Report" submitted by a board of three members to the Department of State under date of December 15, 1906,[35] which furnished the basis of the Act of March 2, 1907, under the heading "Expatriation", it is recommended that the law asserting the right of expatriation (Section 1999 of the Revised Statutes) should be supplemented by an act declaring that

[35]H. Doc. 326, 59th Cong. 2nd Sess. p. 23.

expatriation of an American citizen may be assumed under the following conditions:

First. When he obtains naturalization in a foreign state.

Second. When he engages in the service of a foreign government and such service involves his taking an oath of allegiance to such government.

Third. When he becomes domiciled in a foreign state, and such domicile may be assumed when he shall have resided in a foreign state for five years without intent to return to the United States; but an American citizen residing in a foreign country may overcome the presumption of expatriation by competent evidence produced to a diplomatic or consular officer of the United States under such rules and regulations as the President shall prescribe.

Fourth. Any person who shall have accomplished expatriation in the manner set forth in the preceding paragraphs shall, in order to re-acquire American citizenship, be required to comply with the laws applicable to the naturalization of aliens.

Fifth. The exercise of the right of an American citizen to expatriate himself shall only be permitted or recognized in time of peace.

It accordingly appears that the Board enumerated three kinds of acts by which expatriation might be accomplished, and that it may be inferred that any prohibition on expatriation must be regarded as applicable to the acts specified by the Board and subsequently substantially incorporated into law. It consequently seems reasonable to consider it to have been the purpose of Congress to hold all American citizens to their allegiance during times of war and to suspend the operation of statutory provisions respecting the loss of citizenship in any form whatever.[36] In this situation, an American citizen can be required to perform the duties of citizenship and be held to responsibility for any acts inconsistent with his loyalty to the Government of the United States. The construction of the law with regard to the status of persons residing abroad during times of war is obviously a question of much import. The right of such persons to the protection of this Government will in many instances depend upon whether or not the operation of statutory provisions with regard to expatriation has been suspended.

[36]The statutory provision that no person shall be allowed to expatriate himself in time of war appears unfortunately to be at variance with stipulations found generally in the Naturalization Treaties of the United States which obligate this Government without any reservation to treat as nationals of other countries American citizens who become naturalized under the laws of such countries.

At the outbreak of the war in Europe, a considerable number of American citizens enlisted in the British and the French armies. It has been judicially held that anyone taking the oath required by the British Government for enlistment expatriates himself under the law of the United States.[37] Congress evidently took that view, when it enacted legislation permitting persons who might be deemed to have expatriated themselves by taking such an oath to acquire American citizenship by complying with certain formalities. It is not specified in this legislation whether persons who once more acquire American citizenship thereunder shall be regarded as naturalized or as native citizens under the general classification of citizens in the United States. If such persons are to be regarded as naturalized citizens, they presumably come within the scope of the provisions of the Law of 1907 with regard to expatriation by residence abroad. The question of interpretation should probably be considered as settled by the latest act of Congress relative to repatriation. By the Act of October 5, 1917,[38] a person who might be deemed to have lost his citizenship by taking an oath of allegiance to a foreign government was enabled to "resume and acquire the character and privileges of a citizen of the United States". The subsequent Act of May 9, 1918,[39] provided that such a person might "resume his citizenship". A reasonable construction of this provision evidently is that a person by complying with the requirements thereof is restored to precisely his original status.

The status of married women under our law appears to involve some unfortunate questions of doubtful interpretation.

It can probably be stated to be a general principle of our law that the nationality of the wife follows that of the husband.[40] However, it seems a very doubtful question whether the identity of a woman is so merged in that of her husband that when the presumption of expatriation arises against him under the Act of March 2, 1907, it arises also against her. A woman who acquires American citizenship through naturalization probably loses the right to protection whenever it is lost by her husband. And yet there may be some doubt on that point in the case of a woman who has resided in the United States while the husband has

[37] *Ex parte* Griffin (D. C. 1916) 237 Fed. 445.

[38] (1917) 40 Stat. 340.

[39] (1918) 40 Stat. 545, 1 U. S. Comp. Stat. 1 (Supp. 1919) § 4352 (12).

[40] (1907) 34 Stat. 1228, 4 U. S. Comp. Stat. § 3960; see R. S. § 1994.

resided abroad during a period which raised the presumption of expatriation against him. It seems a somewhat different question whether a presumption of expatriation runs against a married woman of American birth whose husband is a naturalized American and as such is subject to the provisions of the Act of March 2, 1907, relating to expatriation. It is doubtful that the identity of such a woman should be considered to be merged in that of her husband, so that when a presumption of expatriation arises against him, it is also applicable to her. The better view would seem to be that, while Congress has provided that an American woman who marries a foreigner shall lose her citizenship, it has not provided that protection shall be withdrawn from an American-born woman married to a naturalized American citizen against whom the presumption has arisen as a result of residence in a foreign country. It seems pertinent to observe touching this question that the provisions of the Act of March 2, 1907, with regard to expatriation by residence abroad were evidently deliberately framed to deal solely with foreign born persons who become naturalized in the United States.

The wife of a man who expatriated himself by taking an oath of allegiance to a foreign country would evidently be deprived of all nationality if her identity so far as concerns her nationality is completely merged in the identity of her husband, unless he should acquire nationality under the laws of the foreign country by taking an oath of allegiance to it. It seems possible that such a peculiar situation results from the existing law.

Although the law provides that an American woman who marries an alien shall take the nationality of her husband,[41] if she marries an alien when the United States is at war, she presumably remains an American citizen under the law of the United States, notwithstanding that under the law of a foreign country she may take the nationality of her husband. Our law, therefore, appears to have the effect, as has before been pointed out, of giving her an unfortunate dual status. Possibly the view might be taken that on the conclusion of peace her American citizenship is lost.

The status under the law of the United States of a woman possessing enemy nationality who marries an American citizen seems very doubtful in view of the provisions of Section 1994 of the Revised Statutes, that a foreigner marrying an American takes the nationality of her husband only in case she "might

[41](March 2, 1907) 34 Stat. 1228; 4 U. S. Comp. Stat. (1916) § 3960.

herself be lawfully naturalized". Section 2171 of the Revised Statutes, which has been repealed by statutory provisions of similar purport,[42] provided that: "No alien who is a native citizen or subject, or a denizen of any country, State, or sovereignty with which the United States is at war shall be admitted to become a citizen of the United States." Section 2169 of the Revised Statutes restricts naturalization to "aliens being free white persons", and to "aliens of African nativity and to persons of African descent". Whether the limitation provided for by Section 1994 of the Revised Statutes should be construed as having reference solely to women not included within the classes of persons who can become naturalized by virtue of Section 2169 of the Revised Statutes, or as being applicable also to women of enemy nationality is a question apparently not settled by judicial decisions. The latter alternative appears to be the better view. However, such a construction would seem to result in leaving the alien woman with no nationality, since in all probability she would through marriage lose her nationality under the law of the enemy state. Possibly the view might be taken that on the conclusion of peace the woman automatically, so to speak, acquires the nationality of her husband. The question is one of interest in connection with the considerable number of marriages contracted by American soldiers in occupied territory in Germany.

The status of minors who become naturalized through the naturalization of parents involves a doubtful question of much concern to authorities who have to deal with questions of citizenship. In a case in which the parents reside abroad for a sufficient period of time so that the presumption of expatriation runs against them, it would seem a logical view that the children will also become expatriated on the theory that the child while a minor should have the same status as that of the parent. While this construction probably offers the best practicable solution of the question, it would appear to involve some inconsistency applied to the case of a child who remains in the United States while the parents reside abroad and become expatriated.

Probably the most serious question of doubtful construction of the law, which can scarcely be said to have been settled satisfactorily by judicial decision, is the precise meaning of the provisions of the law with regard to expatriation by residence abroad. Attorney General Wickersham in an opinion rendered on Decem-

[42](May 9, 1918) 40 Stat. 545, 1 U. S. Comp. Stat. (Supp. 1919) § 4352 (11).

ber 1, 1910,[43] expressed the view that the Act of March 2, 1907, was limited to naturalized citizens while residing in foreign countries beyond the period stated in the Act, the object thereof being to relieve the Government from the obligation to protect such citizens after residence abroad of a sufficient time to raise the presumption that they do not intend to return to the United States, and that the Act did not apply to citizens who return to the United States, as the act of returning rebuts the presumption of non-citizenship.

However, on March 31, 1916, a decision [44] was rendered by Judge Hough of the District Court of the United States for the Southern District of New York in which the Act of March 2, 1907, is given a construction at variance with that put upon it by Attorney General Wickersham.

A person named Anderson came to the United States from Sweden in 1891, was naturalized in 1905, and in the year following returned to Sweden, where he remained continually until 1915, when he again returned to this country. On arrival in New York the immigration authorities found him insane and nearly penniless. He, having been held as an alien within the prohibited classes, and ordered deported by the Secretary of Labor, a writ of *habeas corpus* was taken out in his behalf. The court discharged the writ and remanded the relator.

Judge Hough in his opinion referred to the conclusions reached by Attorney General Wickersham in the opinion above referred to, to the effect that the presumption of expatriation raised by the Act of March 2, 1907, was created to relieve the Department of State from protecting naturalized citizens abroad "when the conditions are apparently such as to indicate that they have no *bona fide* intention to return and reside in the United States" and that, therefore, when "a citizen returns to the United States, and the necessity for such protection exists, it is fair to assume that with the cessation of the necessity the presumption created by the act also ceases". Judge Hough said that there is no such limitation in the Act itself and no obscurity in the language of the section in question; and in accordance with his construction of the law he expressed his conclusions regarding the case at bar as follows:

"It follows that by force of the statute Anderson lately presented himself at the door of this country with a statutory presumption against him that he had ceased to be an American citizen by reason of his long-continued residence in the land of his birth.

[43] 28 Op. Atty. Gen. 504.

[44] United States *ex rel.* Anderson *v.* Howe (D. C. 1916) 231 Fed. 546, 549.

"I think this is a rebuttable presumption, but am clearly of opinion that there is nothing in the evidence to sustain the rebutter. It follows that Anderson is an alien, and as such plainly to be excluded upon the facts duly found and shown in the return to the writ."

This decision though explicit in some respects leaves uncertain so far as concerns judicial construction of the act the status of a great number of persons in that it did not definitely pass upon the question of whether a person on his return to the United States can rebut the presumption of expatriation. And of course it would be highly desirable to have a comprehensive construction of the law by the court of last resort clarifying the following points: (1) whether a person against whom the presumption of expatriation has arisen which he has tried and failed to rebut in a foreign country should after his return to the United States be regarded as having lost his American citizenship; (2) whether if such is the case he can regain citizenship and if so under what procedure; (3) whether in case he has not attempted while abroad to rebut the presumption he should be given an opportunity to do so before being excluded as an alien if he comes within a prohibited class; and (4) whether the American citizenship of a naturalized person residing in the United States is subject to challenge at any time because of some past residence abroad for a sufficient length of time to raise a presumption of expatriation which no effort was ever made to rebut, and if such is the case, whether such a person is entitled to some kind of an opportunity to rebut the presumption, in case for example his right to vote or his right to obtain a passport should be questioned. The recommendation in the report of the Citizenship Board on the first point above mentioned was explicit. It is unfortunate that the law should not have been framed in equally clear terms.

The question strongly suggests itself whether there is not considerable inconsistency in the laws of a country, which has emphatically professed to value and to dignify citizenship acquired through naturalization but which has, nevertheless, by statutory enactments created a series of presumptions to nullify such citizenship when a naturalized citizen resides abroad for a certain period of time. Laws of this character may be of much convenience to authorities vested with their administration. And they may appear to have considerable justification in view of the large number of persons who become naturalized in the United

States, not a few of whom return to the country of their origin and after their return have no serious intention of fulfilling the obligations of American citizenship. It should be borne in mind, however, that the character and extent of the protection to be given to such persons, in the light of the facts of any given case, lies in a measure in the discretion of the executive department of the Government.[45] It would seem more consistent with the dignity of American citizenship that a sound discretion should be exercised in such matters at the cost of some greater effort and inconvenience than that the rights of American citizenship should in a large measure be determined in accordance with certain simple arithmetical rules. The existence in the United States of two classes of citizenship, with pronounced distinctions, seems decidedly obnoxious to the principles of Americanism. In any event it seems obvious that our statutory provisions relative to expatriation by residence abroad should, for several reasons relating to the practicable application of the law, as well as to the fundamental principles of citizenship, at most be no more drastic than they were construed to be by Attorney General Wickersham; that is, they should go no further than to deprive persons of protection while residing abroad and should not entirely nullify their citizenship. Furthermore, it would seem that any statutes of this character should be applicable to native and naturalized citizens alike.[46] It is interesting to observe with regard to this subject that one of the purposes of the British law of nationality which became effective in 1915 apparently was to assure naturalized subjects the same legal status as that of natives. As a preliminary step toward enhancing the value of American citizenship obtained through naturalization it may be that a restriction of the privilege of acquiring naturalization would be desirable.

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[45] 3 Moore, *op. cit.* 757-789.

[46] Legislation which might have the effect of depriving native citizens of protection abroad but not of citizenship could evidently raise no question as to the right of Congress under the Constituton to deprive such persons of constitutional rights of citizenship. But even the right of Congress to deprive natives of citizenship appears to be assumed in existing legslation. The Act of March 2, 1907, provides that *any* American citizen shall be deemed to have expatriated himself when he shall be naturalized in a foreign country or when he has taken an oath of allegiance to a foreign state. It further provides that *any* American woman who marries a foreigner shall take the nationality of her husband. The power of Congress to enact this provision was sustained in Makenzie *v.* Hare (1915) 239 U. S. 299, 36 Sup. Ct. 106.